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FREEDOM OF INFORMATION



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Sydney Schulman,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-382

Commissioner, State of Connecticut, Department of
Correction; and State of Connecticut, Department of
Correction,

Respondent(s)

February 22, 2016

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, March 23, 2016**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE March 11, 2016**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE March 11, 2016**. PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE March 11, 2016**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Sydney Schulman
James Neil, Esq.
cc: Craig Washington

02-22-2016/FIC# 2015-382/Trans/wrbp/VDH/VB

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Sydney Schulman,

Complainant

against

Docket #FIC 2015-382

Commissioner, State of
Connecticut, Department of
Correction; and State of
Connecticut, Department of
Correction,

Respondents

February 16, 2016

The above-captioned matter was heard as a contested case on October 21, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. It is found that, by email dated May 21, 2015, the complainant requested that the respondents provide him with a copy of the following records:
 - a. A copy of all qualified bids received, other than the one submitted by me, in response to RFP #DOC-ILAP-15-SS;
 - b. The name and address of the person or entity selected by the pertinent committee to negotiate with for a contract pursuant to RFP #DOC-ILAP-15-SS;
 - c. The name of [the] persons on the committee to select and recommend a potential vendor for negotiations for a contract pursuant to RFP #DOC-ILAP-15-SS;
 - d. A copy of any communication, electronic or otherwise, of the recommendation of the bid reviewing committee for such RFP; and
 - e. A copy of Commissioner Semple's approval of the recommendation of the reviewing committee.

3. It is found that, by email dated May 22, 2015, the respondents acknowledged the request, indicating that the request had been forwarded to the appropriate unit with the Department of Correction (the "DOC") for processing.

4. By letter dated June 2, 2015 and filed June 3, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide him with copies of the requested records described in paragraph 2, above. In the complaint, the complainant requested that the Commission consider the imposition of a civil penalty against the respondents.

5. Section 1-200(5), G.S., provides:

"Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

6. Section 1-210(a), G.S., provides in relevant part that:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

7. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

8. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. It is found that there is no record in the respondents' possession that would be responsive to the request described in paragraph 2.b, above. In addition, it is found that, subsequent to the contested case hearing, the respondents provided the complainant with unredacted records responsive to the requests described in paragraphs 2.c through 2.e, above. See Resp. Post-Hearing Ex. 1. Accordingly, only the request described in paragraph 2.a, above, remains at issue in this case.

10. It is found that the complainant (and/or his law firm) had been the vendor running the inmate legal assistance program in Connecticut since November 1, 1995 until July 1, 2015.

11. It is found that, on or about February 1, 2015, the DOC issued a request for proposals (“RFP”) directed toward vendors interested in competing for the contract to run the inmate legal assistance program. It is found that the specific RFP was designated as follows: RFP #DOC-ILAP-15-SS/Inmate Legal Assistance Program (the “ILAP Contract”). It is further found that the DOC specified that interested vendors should submit their bids by April 6, 2015.

12. It is found that the DOC received three qualified bids for the current ILAP Contract—one bid from the complainant and two separate bids from a single competitor—that is, Bansley Anthony, LLC (the “Bansley Law Firm”).

13. It is found that, by letter dated May 19, 2015, the complainant was informed that the competing bidder had been selected to fulfill the current ILAP Contract and that, effective July 1, 2015, the DOC would begin to transition the services provided by the complainant’s law firm to the Bansley Law Firm. It is further found that, once the Bansley Law Firm was selected, negotiations began between the DOC and the Bansley Law Firm with regard to the terms of the ILAP Contract.

14. Thereafter, on May 21, 2015, the complainant issued the request for records described in paragraph 2, above.

15. At the contested case hearing, the complainant contended that he wanted to review the bids that were submitted by the Bansley Law Firm to the DOC in order to perfect his own bid and to contest the selection process used to award the current ILAP Contract to the Bansley Law Firm.

16. The respondents contended that the requested records were exempt pursuant to §1-210(b)(24), G.S., at the time they were requested. The respondents further contended that portions of the requested records were exempt from disclosure pursuant to §1-210(b)(5)(A), G.S.

17. The respondents produced three witnesses who provided testimony on the following topic areas: first, when the FOI request was received, how and when it was acknowledged, and where it was sent for processing; second, what records were gathered and provided to the complainant; and third, the basis for the redactions contained in the records that were ultimately disclosed to the complainant.

18. At the conclusion of the testimony, the complainant moved, without objection, to have the Commission conduct an in camera inspection of the responsive records. The hearing officer granted the complainant’s motion and the records were ordered to be submitted to the Commission, without redaction, by November 6, 2015.

19. Initially, §1-210(b)(24), G.S., provides that nothing in the FOI Act shall be construed to require disclosure of:

Responses to any requests for proposals or bid solicitation issued by a public agency or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record or file.

20. It is found that, while the process to select the winning bid occurred in May 2015, the actual ILAP Contract between the DOC and the selected vendor was not executed until June 25, 2015, and the negotiations between the DOC and the selected vendor were ongoing at the time the complainant requested the records described in paragraph 2, above. It is also found that all of the records requested in this case are either the actual bids submitted in response to the RFP or are records or files created by the respondents "in connection with the contract award process," within the meaning of §1-210(b)(24), G.S. It is further found that the DOC did not want to disclose specific bids, bidder information, or selection committee recommendations and determinations during the actual selection process or subsequent negotiations because it believed that doing so would have been disruptive to the process itself.

21. However, after the contested case hearings, a review of the administrative record revealed that the respondents had failed to provide any evidence from which it could be determined that the "the chief executive officer [of the DOC]" had certified "that the public interest in the disclosure" of the bids was "outweighed by the public interest in the confidentiality" of such records, within the meaning of §1-210(b)(24).

22. In order to provide the respondents with an opportunity to provide such evidence, the hearing officer, by order dated November 2, 2015, reopened the contested case hearing process and ordered the respondents to appear at a reopened hearing with a witness who could provide evidence with regard to the statutory requirements set forth in paragraph 21, above. In addition, because an analysis pursuant to §1-210(b)(24), G.S., would not require an in camera review of the underlying bids, the hearing officer rescinded the in camera order.

23. Thereafter, on November 10, 2015, the respondents responded to the order reopening the contested case hearing, in relevant part, as follows: "The DOC cannot produce a witness to provide testimony regarding the executive officer's certification that the public interest in the disclosure of the requested records was outweighed by the public interest in confidentiality. As a result, the DOC concedes on this point. . . ."

24. Accordingly, it is concluded that the respondents failed to prove that the requested records were exempt from disclosure pursuant to §1-210(b)(24), G.S., at the time such

records were requested by the complainant.

25. By order dated November 12, 2015, the hearing officer reinstated the in camera order, requiring the respondents to submit a copy of the unredacted bids to the Commission for an in camera inspection.

26. On November 30, 2015, the respondents submitted the records at issue to the Commission for an in camera inspection (the "in camera records"). The in camera records, which will be referred to as IC-2015-382-1 through IC-2015-382-77, are fairly described as one thirty-nine page bid submission and another thirty-eight page bid submission.

27. The final contention in this case is that some of the information contained in the two bid submissions is trade secrets that are exempt from disclosure pursuant to §1-210(b)(5)(A), G.S.

28. It is found that the DOC promptly notified the Bansley Law Firm that the complainant had requested its bid submissions. It is found that the Bansley Law Firm reviewed its submissions and provided suggested redactions to the DOC based on the claim that such information was exempt from disclosure as trade secrets.

29. Section 1-210(b)(5)(A), G.S., provides that that nothing in the FOI Act shall be construed to require disclosure of:

Trade secrets, which for purposes of the [FOI] Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy

30. The definition of "trade secret" in §1-210(b)(5)(A), G.S., "on its face, focuses exclusively on the nature and accessibility of the information." Univ. of Connecticut v. FOIC, 303 Conn. 724, 733 (2012). "In order to qualify for a trade secret exemption of §1-210(b)(5)(A)[,G.S.], a substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means." Director, Dep't of Info. Tech. of Town of Greenwich v. FOIC, 274 Conn. 179, 194 (2005).

31. It is found that, on or around August 28, 2015, after having redacted the two bid submissions as was suggested by the Bansley Law Firm, the DOC disclosed the bid submissions to the complainant.

32. Attorney Kristen Losi, an Associate Attorney and the Assistant Director of the Inmate Legal Aid Program at the Bansley Law Firm appeared at the contested case hearing

as a witness to provide testimony with regard to the redactions contained in the bid submissions.

33. The respondents contend that the bid submissions contain a detailed explanation of the Bansley Law Firm's standard operating procedure ("SOP") with regard to processing matters involving the provision of inmate legal services. They further contend that the SOP is a written summary of the Bansley Law Firm's formula for processing inmate legal matters, which utilizes a series of databases in a specific order and in a particular manner. The respondents further contend that the Bansley Law Firm developed the SOP over the course of several years. In addition, Attorney Losi testified that a person or entity who had no experience handling an inmate legal services matters could "take the firm's SOP, walk out the door with it, and essentially run that area of law on his own."

34. Upon a careful review of the in camera records, it is found that much of the redacted materials are generalized descriptions of the legal services that the DOC could expect to receive for the inmates if the Bansley Law Firm was selected to fulfill the ILAP Contract and that such descriptions are generally known or are readily ascertainable. It is found the bid submissions do not contain in-depth, step-by-step descriptions for processing particular kinds of inmate matters, such as habeas corpus cases, criminal appeals, or matters challenging the conditions of confinement. It is further found that there are no "formulas" contained within the bid submissions that would allow someone without experience or expertise in the area of providing legal services to inmates to begin providing such services to an incarcerated population.

35. In addition, it is found that many of the redactions describe how Connecticut's correctional facilities would be staffed with attorneys and other professionals from the Bansley Law Firm. It is found that the redacted materials describe the educational backgrounds and legal experience of these professionals, and provide a statement of how much time the Bansley Law Firm plans to devote from each professional toward the fulfillment of the obligations under the ILAP Contract. It is found that the redacted information also sets forth the hourly rates of pay for the professionals, provides an overall contract cost, and describes the kind and quantity of technology that would be available to such professionals. Finally, it is found that the redacted information provides a statement on how to best communicate with an incarcerated population, describes the overall hierarchy of the proposed staff, and sets forth a brief statement of the firm's philosophy with regard to its current staff.

36. Clearly, it is possible for a SOP to constitute a trade secret. See Wentworth Lab., Inc. v. Probe 200, Inc., et al., No. CV 02-0346892-S, 2002 WL 31758350, at *7 (Conn. Super. Ct. Nov. 19, 2002) (holding that the SOPs at issue were trade secrets, and confidential information in that they constituted a "formula, process or method for manufacturing" a particular kind of product from which the company derived "economic value," which was "not readily ascertainable to others by proper means," and for which the company had taken "reasonable care to maintain their secrecy."). However, in this case, there is no information that could be reasonably classified as anything other than the Bansley Law Firm's proposed administrative plans and projected costs in the event that it was granted the ILAP Contract, combined with a statement on communicating with an incarcerated clientele and rounded out with some general information about its staff. It is found that none of this information can

fairly be construed as rising to the level of a secret “formula, program, method, technique, or processes,” within the meaning of §1-210(b)(5)(A), G.S.

37. Accordingly, it is concluded that the respondents violated the FOI Act by declining to disclose the requested records to the complainant without redactions.

38. Based on the totality of the evidence in this case, the Commission declines to consider the imposition of civil penalties.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint.

1. The respondents shall promptly provide the complainant with an unredacted copy of the bids referred to in paragraph 2.a, of the findings, above, free of charge.



Valicia Dee Harmon
Valicia Dee Harmon
as Hearing Officer